88-1914

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

* * * * * * * * * * * * * * * * * * *

MILTON OSBORNE, JR.,
(PETITIONER)

VERSUS

JESSE N. STONE, JR., INDIVIDUALLY AND AS PRESIDENT OF THE SOUTHERN UNIVERSITY SYSTEM; B.K. AGNIHOTRI, INDIVIDUALLY AND AS DEAN OF SOUTHERN UNIVERSITY SCHOOL OF LAW; AND THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS
(RESPONDENTS)

* * * * * * * * * * * * * * * * * * *

ON WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL AND THE LOUISIANA SUPREME COURT
PETITION FOR WRIT OF CERTIORARI

* * * * * * * * * * * * * * * * * * *

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* * * * * * * * * * * * * * * * * * *

## QUESTIONS PRESENTED

Did the Louisiana First Circuit Court of Appeal err when it reversed the findings of the trial court, (the court of appeal) finding that Petitioner, who was a tenured professor, and faculty member of the Southern University Law School, had abandoned his property interest in his tenured position at the Southern University Law School, resulting in the denial of Petitioner's right to a procedural hearing in accordance with the due process clause of the Fourteenth Amendment of United States Constitution?

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This Court should review the Louisiana First Circuit Court of Appeal's decision because its conclusions and reversal of the trial court are in contravention of the numerous holdings of this Court and the United States Fifth Circuit Court of Appeal, which provide that an individual's entitlement to tenured or continued employment in which there is a property interest in that employment may not be arbitrarily terminated, or deprived of, without due process of the law.

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## OPINIONS BELOW

The original petition of plaintiff was dismissed by the trial court in 1981. The opinion and judgment are unreported (Appended "A"). The opinion of the Louisiana First Circuit Court of Appeal affirming the original dismissal of plaintiff's suit is reported at 472 So.2d 223 (La.App. 1st Cir. 1985) (App. "B"). The opinion of the Louisiana Supreme Court vacating and remanding the judgments of the trial court and the court of appeal is reported at 476 So.2d 809 (La. 1985) (App. "C"). The opinion and amended opinion of the trial court on remand, declaring Petitioner a tenured professor is unreported (App. "D"). The opinion of the court of appeal reversing the decision of the trial court is reported at 536 So.2d 473 (App. "E"). The opinion of the supreme court denying Petitioner's writ for review is reported at 537 So.2d 1164 (App. "F").

## JURISDICTION

The denial of the writ of certiorari of the Louisiana Supreme Court was entered February 17, 1989. The jurisdiction of this court is invoked under 28 USC §1257(a) (1970).

## CONSTITUTIONAL AMENDMENT INVOLVED

United States Constitution, 14th Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

1. Proceedings in the State District Court.

The facts of this case are not in dispute. Petitioner Milton Osborne, Jr. was hired as a law professor at Southern University School of Law in 1971 and acquired tenure in 1975. The "Faculty Handbook" in effect at the time of Petitioner's hiring, acquisition of tenure, and dismissal from the University in 1980, grants a teacher the right to a public hearing before dismissal or discontinuance. Specifically, the "Faculty Handbook" of June 1979, provided in part:

> In case of a recommendation . . . to dismiss or discontinue the employment of a tenured teacher, that teacher shall have the right of a public hearing (emphasis added).

Additionally, the Faculty Handbook requires that written notice of the termination of a tenured faculty member shall be at least twelve (12) months before the expiration of an appointment, and further require that notice be given and a

hearing held. A tenured faculty member may be also dismissed for cause, but only after notice is given and a hearing held.

The same Faculty Handbook required the administration to begin negotiations for appointments for the following Fall Semester as early as possible in the academic year.

It also required that the offer of reappointment be made prior to May 1st for the upcoming Fall Semester, for the following specifically stated purpose:

> To permit a faculty member to give due consideration and timely notice to the institution and the circumstances outlined in paragraph 3, an offer of appointment for the following Fall at another institution should not be made after May 1. The offer should be a 'firm' one, not subject to contingencies.

The Faculty Handbook specifically states that a faculty member should not resign to seek other employment later than May 15th or thirty (30) days after receiving the notification of his terms of continued employment, whichever date is later.

Finally, the Louisiana Teacher's Tenure Law, La. R.S. 17:411, et seq. (made applicable to college teachers by La. R.S. 17:3501), also requires notice and a hearing before a tenured teacher's employment is discontinued.

The evidence is undisputed that Petitioner was not only tenured, but his employment was presumed to have been continuous and he had to do nothing other than accept or reject the "firm" offer of re-employment. The record is likewise not in dispute that Petitioner's contract was for only nine (9) months out of the year, and that he was unemployed each summer. Petitioner and other faculty members were not eligible for unemployment compensation and were free during the summer months to pursue any employment they desired. Petitioner had made a habit of engaging in the practice of law every summer since 1970. Petitioner entered into a law partnership on May 9,

1980, which in no way violated the rules of the American Bar Association.

On May 9, 1980, approximately one and one-half weeks past the deadline imposed by the Faculty Handbook for tendering a contract for the next academic year, Respondent Agnihotri of the Southern Law School sent a letter to faculty asking that they "communicate their availability" to teach full-time in the upcoming academic year. There are no provisions in the faculty handbook or any contract of employment between Petitioner and Respondents authorizing or requiring a "letter of availability." Petitioner did not respond to the May 9, 1980 letter and Respondent Agnihotri sent a letter by certified mail on May 19, 1980, stating that if there was no response within four (4) days by May 23, 1980, that, "we shall assume that you are not available." During this period, Petitioner was giving his final

examinations at the school, grading papers, and engaging in a host of other activities at school. Among them, Respondent Agnihotri wrote a letter to Petitioner relative to an honor code violation by some students and requested that the Honors Committee take the necessary action. On June 12th, Associate Dean Harris requested that Petitioner administer an additional final examination to a student who had missed the earlier examination.

Petitioner did not respond within the four (4) day period required in the May 19, 1980, letter and continued with his activities at the school. On July 21, 1980, Respondent Agnihotri sent a letter to Petitioner, stating that Petitioner had not responded to the letters of May 9, 1980, nor May 19, 1980, and provided in conclusion:

> Please be informed that your name is not being recommended as a member of the law Faculty for the year 1980-81.

Upon receipt of this letter, Petitioner immediately wrote Respondent Agnihotri on July 30, 1980, which provided as follows:

> Receipt of your letter of July 21, 1980, in which you disclosed an expression of intent not to recommend my appointment to the Law School Faculty for the 1980-81 academic year, is hereby acknowledged. Please be advised that I intend and expect that there would be no involuntary interruption of employment as a tenured faculty member of the Southern University School of Law unless and until there has been a finding of just cause after due deliberations and proceeding are had and made definitive. I shall reserve my right to timely accept, reject or seek modification of my presumptively continuous tenured appointment as a member of the law school faculty only after having had a reasonable opportunity to throughly consider the terms and conditions of the appointment for the 1980-81 academic year (App. "G").

Respondents never responded to Petitioner's letter of July 30, 1980. There was no hearing held despite Petitioner's request for "due deliberations and proceeding" contained in his letter of July 30, 1980, and as specifically required by the 1979 Faculty Handbook in effect. On August 25, 1980, Petitioner was notified to

return his keys and was not assigned classes to teach for the 1980-81 semester.

Petitioner, desiring to be assigned classes for the Fall Semester 1980 sought assistance from the Chairman of the Board and various members of the Southern University Board of Supervisors. After talking to the Chairman, Petitioner was under the good faith belief that he was on sabbatical leave without pay for that year and that he would be reassigned classes for the Fall 1981-82 academic year.

During the 1980-81 academic year Petitioner continued to serve as the representative of Southern University on the Board of Governors at the Louisiana Bar Association, the Bar Admissions Committee, and the Louisiana Law Institute. During this period of time, repeated meetings were held by Petitioner with members of the Board of Supervisors to insure that Petitioner

would be reappointed for the 1981-82 academic year.

The remainder of the course of events is accurately summarized by the Louisiana First Circuit Court of Appeal in the opinion complained of herein as follows:

> . . . [T]hroughout the next year [Petitioner] . . . engaged in informal attempts to resolve the situation by talking with various members of the Southern University Board of Supervisors. After a July 6, 1981, meeting with Jesse N. Stone, Southern's president, and a follow-up letter by Williams to Agnihotri intended to serve as notice that plaintiff was now available to teach, Stone wrote Williams on August 3, 1981. This letter stated in part: "As indicated to you in our conversation, the Dean is of the opinion that Mr. Osborne's abandonment of his job for a period of one full academic year under the circumstances here present is inexcusable and amounts to a resignation." On November 12, 1981, Williams made formal demand on Lionel Johnson, Chairman of the Southern University Board of Supervisors, for a hearing. No hearing was ever held. On November 12, 1981, plaintiff filed suit for "Declaratory Judgment and Other Relief" against [Respondents]. . . .
>
> Defendants filed an exception of laches and lack of diligence which the trial court sustained, and it dismissed Plaintiff's suit. Plaintiff took a devolutive appeal to the this court which, in a 3 - 2 decision, affirmed the trial

> court. The [Louisiana] Supreme Court then granted a writ, . . . [vacating and remanding].
>
> After remand, defendants amended their answer to affirmatively plead the doctrine of equitable estoppel or laches. After trial, the court granted the declaratory judgment and found that plaintiff did not resign from [nor abandon] his tenured position at Southern. In its original reasons for judgment it denied, however, plaintiff's demand for salary. Later, the trial court amended its original reasons and granted plaintiff his salary for the academic years beginning with 1984-85. Defendants have suspensively appealed.

2. Relevant Rulings of the Louisiana First Circuit Court of Appeal:

The court of appeal reversed and held:

> It was plaintiff's voluntary refusal to respond to Southern's reasonable request for advice as to his full-time availability for teaching the fall 1981 semester which created the loss of his job.

Despite the violations of the administration by not tendering a contract to Petitioner before May 1, 1980, and Petitioner was prohibited by the same Faculty Handbook from resigning after May 15, 1980, the court held that Petitioner abandoned his job by not responding to the letters of May 9th and May 19th. It also held that inasmuch as Peti-

tioner "abandoned" his position, this divested him of any protective property rights and, as such, he was not entitled to the due process protection required by the U. S. Constitution. The court of appeal also held that because of this "abandonment," Petitioner was not entitled to any hearing as required by the Faculty Handbook, the La. Teachers' Tenure Law, and as requested in Petitioner's letter of July 30, 1980.

3. Writ Application to the Louisiana Supreme Court.

Petitioner filed a writ of certiorari to the Louisiana Supreme Court contending that:

The court of appeal erred and abused its discretion in reversing the decision of the trial court and specifically by failing to grant Petitioner a public hearing in accordance with the due process clause of the Louisiana and U.S. Constitution prior to depriving him of his employment as a tenured faculty member of the Southern University School of Law, and by failing to enforce the

provisions of the La. Teacher's Tenure Act and the Faculty Handbook requiring a hearing prior to termination of tenured faculty .

4. Raising of Constitutional Questions in State Court Prcceedings:

Petitioner's original petition filed in the district court made the following allegation:

IX.

> In violation of state and federal law as well as the published rules of procedure promulgated by the university, the defendants, Jesse N. Stone and B.K. Agnihotri, conspired to deny Petitioner of his rights under the applicable tenure law regulations.

Additionally, in paragraph X, Petitioner alleged that the Defendants legally conspired to

> . . . deprive Petitioner not only of his contractual rights, but also his due process to be presented with charges; to face his accuser, and to answer any allegations of wrong doing at a hearing prior to the termination of his employment."

Petitioner's initial petition was dismissed by the district court on the basis of an exception of laches filed by the

Respondents. The district court's opinion was affirmed by the Louisiana First Circuit Court of Appeal, but reversed by the Louisiana Supreme Court and remanded for trial.

Before the trial on the merits, Petitioner amended his original petition and specifically alleged a violation of substantive and procedural due process under the 14th Amendment to the United States Constitution in Paragraph IX, to wit:

> Defendants have denied Petitioner his rights under the following: The applicable Tenure Laws and other regulations of Southern University; the Constitution and Laws of the State of Louisiana; the Constitution and Laws of the United States of America particularly Petitioner's right of substantive and procedural due process under the Fourteenth Amendment to the U.S. Constitution; . . . (App. "G").

The district judge found there had been a denial of due process by holding in Petitioner's favor. The court of appeal reversed, ignoring the due process argument and resting its decision solely upon the

finding that Petitioner abandoned his position and, therefore, had no rights subject to due process protection. Petitioner raised the constitutional due process argument in the writ application to the Louisiana Supreme Court (App. "H").

## REASON FOR GRANTING WRIT

THIS COURT SHOULD REVIEW THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL'S DECISION BECAUSE ITS CONCLUSIONS AND REVERSAL OF THE TRIAL COURT ARE IN CONTRAVENTION OF THE NUMEROUS HOLDINGS OF THIS COURT AND THE UNITED STATES FIFTH CIRCUIT COURT OF APPEAL, WHICH PROVIDE THAT AN INDIVIDUAL'S ENTITLEMENT TO TENURED OR CONTINUED EMPLOYMENT IN WHICH THERE IS A PROPERTY INTEREST IN THAT EMPLOYMENT MAY NOT BE ARBITRARILY TERMINATED OR DEPRIVED OF WITHOUT DUE PROCESS OF THE LAW.

It is respectfully submitted that the opinion of the Louisiana First Circuit Court of Appeal is clearly erroneous and contrary to the previously established Federal and State jurisprudence requiring compliance with the due process provisions of the U.S. Constitution prior to divesting a tenured faculty member of his employment. Also, it is respectfully submitted that the court of appeal failed to enforce the provisions of the Southern University Faculty Handbook requiring a hearing prior to termination, and failed to enforce the provisions of the Louisiana Teacher's Tenure Act; and, in so

doing, has arbitrarily and capriciously deprived Petitioner of his due process rights. The court of appeal has decided that failure to respond to a letter not authorized by contract or law is sufficient grounds to deprive an individual of his right in property without due process of the law in contravention of this Court's holdings in numerous cases, especially Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed 692 (1955) and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 336 L.Ed.2d 548 (1972).

Specifically, the court of appeal holds that Petitioner "abandoned" his position because he did not respond to two (2) letters from Respondent Agnihotri, albeit Petitioner was at work at the law school administering and grading examinations, and attending to other duties during that time. The court of appeal stated that "Plaintiff never showed up to teach classes for the

fall of 1980." The court of appeal ignores the fact that Petitioner was wrongfully deprived of his employment for Fall 1980 and was assigned no classes to teach, no classroom to teach in and no students to teach.

The court of appeal has pronounced that the application of the U.S. Constitution's safeguards against arbitrary and capricious deprivation of property rights as embodied in the 14th Amendment's due process clause is merely discretionary when the State can justify a misunderstanding between the parties as an "abandonment." The court of appeal has ignored this Court's holdings that one vested with an interest in employment, such as a tenured professor, enjoys the protective devices of the due process clause of the 14th Amendment. Correspondingly, the court intentionally disregarded this Court's holding in Slochower v. Board of Education, 350 U.S. 551, that a tenured college professor has an interest in

continued employment that is safeguarded by due process.

The 14th Amendment is applicable because Southern University Law School is a public institution organized under the laws of and administered by the State of Louisiana.

This not being in contention, the court of appeal found that Petitioner's actions or inactions were an abandonment of his rights in his tenured status as a professor, thus requiring no due process protection. Also, it is admitted and evidence shows that Petitioner did indeed have a valid property right in his tenured position.

What is tantamount in determining whether due process protection attaches is whether or not an individual has a property interest in his employment. This Court recognized in Board of Regents v. Roth, supra, the principle that, "[p]roperty interests are not created by the due process clause, rather they stem from independent sources such as

state law" (408 U.S. at 577, 92 S.Ct. at 2709). Petitioner has an individual entitlement to continued employment as a tenured professor by his contract with Southern University and by virtue of the La. Teachers Tenure Act, La. R.S. 17:441, et seq. R.S. 17:443(a) clearly provides that before a tenured teacher shall be dismissed for cause there shall be notification to the teacher in writing of the pending charges and an opportunity for an administrative hearing. Louisiana's state law has created a constitutionally protected property interest in petitioner's continued employment by the Southern University Law School, which could only be terminated in accordance with the recognized principles of due process, i.e. adequate and timely notice and a meaningful opportunity to be heard. See Perry v. Sindermann, 408 U.S. 593 (1972).

Further, the court of appeal explained in Findeisen v. North East Independent School

District, et. al., 749 F.2d 234 (5th Cir. 1984), that in order to determine whether a former tenured school teacher has alleged a cognizable violation of his 14th Amendment right to due process, two inquires need to be made: first, was he deprived of a protected property interest; and, if so, was the deprivation accomplished without adherence to due process minimums (749 F.2d at 237).

It is important to note that the Fifth Circuit recognized that "the consideration, . . . is whether Findeisen has stated a procedural due process claim" (749 F.2d at 236). Just as Findeisen's property interest in his employment was found to have been worthy of due process protection, Petitioner has a protected interest in continued employment, regardless of his failure to respond to Respondent Agnihotri's request for availability for employment during the 1980-81 academic year. Therefore, the con-

stitutional requirements that he be given notice and an opportunity to be heard prior to termination are applicable.

Petitioner never received any of these rights. Petitioner was entitled a due process hearing to establish the cause of the failure to answer the letters, if this was to be the basis for a dismissal or finding of abandonment. As cited in Jones v. Orleans Parish School Board, 679 F.2d 32 (5th Cir. 1982), where there is a finding that an individual "abandoned" his property as a result of circumstances attributed to the individual by the State, without any opportunity to counter such accusations in a due process hearing, that finding of abandonment may be suspect:

> . . . [I]n the case of tenured employees, the process of discharging employees for 'abandonment' must comport with due process requirements. For example, the state may not by simply labeling some action or lack of action 'abandonment' create a right to discharge a public employee as a subterfuge to defeat tenure requirements. . . . But if there is any factual issue about whether the teacher

> did fail to meet the requirements, the teacher is entitled to notice and hearing with respect to such issue. If there is an issue as to the facts and their application to the statute, the automatic waiver of notice and hearing provided in the Louisiana Teacher Tenure Law could not be applied without running afoul of Fourteenth Amendment due process requirements. . . . The Board cannot under the contested facts of this case rely upon an automatic right to discharge without any obligations on the Board to take actions by way of communication with Jones and giving him the opportunity to be heard on disputed issues (679 F.2d at 36).

The Louisiana First Circuit Court of Appeal has found exception with the well established principles of constitutional law and the analysis of the Fifth Circuit in Jones. The court of appeal relied upon a 1949 decision handed down by the Louisiana Supreme Court, State ex rel. Cody v. Caldwell Parish School Board, 215 La. 645, 41 So.2d 461 (1949), in which the failure of a tenured teacher to return a signed contract by a specified date constituted a voluntary termination of employment and waiver of the teacher's right to notice and a hearing under Louisiana's Teacher Tenure

Law. However, more recently, the Fifth Circuit found in Jones v. Orleans Parish School Board, supra, that if there is an issue as to the facts and their application to the statute, the automatic waiver of notice and hearing provided in the Louisiana Teacher Tenure Law could not be applied without running afoul of Fourteenth Amendment due process requirements. It is this disagreement between the Louisiana First Circuit Court of Appeal and the Fifth Circuit which brings Petitioner to this Court for a finding that the court of appeal abused its discretion in failing to find as the Fifth Circuit did in Jones.

The court of appeal is simply under the misconception that a letter from Petitioner to Respondent Agnihotri expressing concern that his continuous tenured appointment as a member of the law faculty not be disturbed until a finding of "just cause and due deliberations" by the appropriate administra-

tive body was of great significance as to whether this tenured professor was entitled to a hearing. Whether or not Petitioner's letter requested a hearing to determine the reasons for his discharge is of no significance. The court of appeal has misread this Court's reasoning in Board of Regents v. Roth, supra. The court said about Roth:

> [E]ven though plaintiff; a tenured law professor, possessed a property interest in his position which requires due process protection both under state and federal constitutions, we find that he abandoned his position which action divested him of any protected property rights. Board of Regents v. Roth, 92 S. Ct. 2701 (1972).

The court of appeal in applying Roth failed to recognize that Roth merely stands for the proposition that a tenured faculty member has a property interest in his employment which is protected by due process requirements. The court misapplied Roth which does not address the idea that the plaintiff may have abandoned his interest in his employment. This Court acknowledged in Roth that due process protects only those

interests that a person has already acquired in specific benefits.

The court of appeal cites five (5) cases in support of its position that Petitioner is not entitled to the due process protection of the U.S. Constitution. None of these cases support the position taken in the court's opinion that a tenured professor can be deprived of his employment without fulfilling the due process requirements of the United States Constitution.

Specifically, in Board of Regents v. Roth, 92 S.Ct. 2701 (1972), as above mentioned, the court of appeal misapplied the holding of this Court which recognized that a tenured faculty member, whose contract had been normally renewed before, had an expectancy of employment and that this was a property right protected by the due process clause of the United States Constitution.

In Bell v. Department of Health and Human Resources, 483 So.2d 945 (La. 1986), cert.

denied, 107 S.Ct. 105, the supreme court held that a civil service employee (not a teacher) who had been reallocated to another position was not entitled to a notice or hearing under certain circumstances. This case is simply inapplicable.

In Kalme v. West Virginia Board of Regents, 539 F.2d 1346 (4th Cir. 1976), the tenured faculty member was reappointed and assigned classes to teach. He failed to appear for class and intentionally and flagrantly breached his contract. Nevertheless, he was still granted a hearing in accordance with the rules of the university and the due process requirements of that State's Constitution and the U.S. Constitution prior to the tenured employee's termination. While the court cited Kalme, they seemed to ignore the holding and the spirit of the decision which was that when there are issues or disputed facts wherein there may be disagreement thereof, a hearing which

comports to due process requirements is not only desired, but required.

In Akyeampong v. Coppin State College, 539 F.Supp. 986 (D. Maryland 1982), the university reappointed the tenured faculty member to his position for that academic year and assigned him classes. The faculty member did not show up for class after being assigned classes and, instead, attended another university without authority from the college that employed him. After Plaintiff did not show up, the university wrote him stating that his absence was not approved, that he was in violation of his employment contract, and his employment was considered at an end. This was affirmed at a subsequent hearing. Unlike Akyeampong, Petitioner was never reappointed, given a contract, assigned classes, and despite his request, was not given a hearing at any time.

The case of Jones v. Orleans Parish School Board, supra, cited by the court of appeal

actually is directly on point but supports Petitioners' position that he was wrongfully deprived of his employment. Jones brought an action against the School Board alleging violations of Title VII, 42 U.S.C. § 2000 et seq., 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. 1985. The district court held that the Section 1981 and Section 1983 claims were prescribed. And, Jones had abandoned his teaching position.

The Fifth Circuit rejected this and remanded the case to the district court to consider the evidence to determine whether or not his right to due process was violated. Of course, in the instant case, the trial court did determine that Petitioner Osborne had not abandoned his position and, therefore, his rights to due process were violated and ordered the Petitioner reinstated. The court of appeal's reference to Note 6 in the Jones opinion, is again supportive of Petitioner's position in the

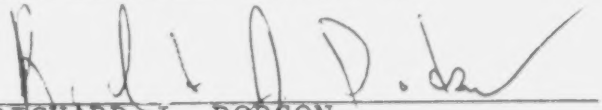
instant case. Note 6 in the Jones opinion simply provided that the Board could not argue in that case that the alleged abandonment was the equivalent of a voluntary resignation since the Board never actually terminated him. Strangely, this is exactly what is argued in the instant case pertaining to Petitioner in direct violation of the rule enunciated in this footnote. The rehearing of Jones v. Orleans Parish School Board, 688 F.2d 342, simply is not applicable and did nothing to change any of the rules enunciated in the first opinion. The Fifth Circuit simply held that while a three year Louisiana prescriptive period might apply to a tenured teacher who sued for violation of his contractual rights, a Title VII claim of racial discrimination is barred by the passage of a one (1) year limitation. The cases cited by the court of appeal do not support their opinion.

## CONCLUSION

Petitioner urges this Honorable Court to issue a writ of certiorari to the Louisiana First Circuit Court of Appeal, in order that this court may review the decision of the court of appeal reversing the judgement of the District Court holding Petitioner to be a tenured faculty member and further holding that Petitioner did not abandon his position. The trial court's decision was proper under the evidence of record and mandated by the facts of this particular case. The rights of Petitioner have not been protected in the instant case and he has not been afforded due process as required by the U.S. Constitution.

Applicant prays that this Court issue a writ of certiorari to the opinion of the First Circuit Court of Appeal of the State of Louisiana and reverse or annull their decision which reversed the judgment of the trial court.

RESPECTFULLY SUBMITTED:



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APPENDIX "A"

| | |
|---|---|
| MILTON OSBORNE, JR. | NUMBER 261,717<br>DIVISION "H" |
| VERSUS | |
| JESSE N. STONE, JR. INDIVIDUALLY AND AS PRESIDENT OF THE SOUTHERN UNIVERSITY SYSTEM; B.K. AGNIHOTRI INDIVIDUALLY AND AS DEAN OF SOUTHERN UNIVERSITY SCHOOL OF LAW; AND THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS | 19TH JUDICIAL DISTRICT COURT<br>PARISH OF EAST BATON ROUGE<br>STATE OF LOUISIANA |

JUDGMENT

This cause having been duly heard and submitted to the court on defendants' exception of laches and the court considering the law and evidence to be in favor of the defendants, JESSE N. STONE, JR., individually and as PRESIDENT OF THE SOUTHERN UNIVERSITY SYSTEM; B.K. AGNIHOTRI, individually and as DEAN OF SOUTHERN UNIVERSITY SCHOOL OF LAW; and THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS, as more fully set forth in written reasons for judgment dated April 25, 1983.

IT IS ORDERED, ADJUDGED, AND DECREED that there is judgment herein in favor of the defendants and against the plaintiff sustaining defendants' exception of laches and dismissing plaintiff's suit. Costs of this proceeding is to be borne by plaintiff, MILTON OSBORNE, JR.

JUDGMENT RENDERED on April 25, 1983.

JUDGMENT READ AND SIGNED in Baton Rouge. Louisiana, on this 16th day of Dec., 1983.

s/ JUDGE DANIEL W. LEBLANC
19th JUDICIAL DISTRICT
COURT DIVISION "H"

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| MILTON OSBORNE, JR. | 19TH JUDICIAL DISTRICT COURT |
| VS. | PARISH OF EAST BATON ROUGE |
| JESSE N. STONE, JR. INDIVIDUALLY AND AS PRESIDENT OF THE SOUTHERN UNIVERSITY SYSTEM; B.K. AGNIHOTRI INDIVIDUALLY AND AS DEAN OF SOUTHERN UNIVERSITY SCHOOL OF LAW; AND THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS | STATE OF LOUISIANA |
| | NUMBER 261, 717 |
| | DIVISION H |

WRITTEN REASONS FOR JUDGMENT

This matter came before the Court on defendants' exception of laches. Plaintiff, Milton Osborne, Jr., initially filed suit for declaratory judgment defining his employment status and for reinstatement with back pay and benefits to his teaching position at Southern University School of Law.

Although laches is not favored in the law, the doctrine is applicable where there is sufficient proof of two elements, (1) an unreasonable delay in presentation of the claim and (2) substantial prejudice to or

upset of the orderly fiscal process of government. Stansbury vs. City of Opelousas (3rd Cir. 1977) 341 So. 2d 33, Bradford vs. City of Shreveport (La. 1975) 305 So. 2d 487.

From May through July of 1980, three letters were sent to the plaintiff from Dean Agnihotri requesting information on his availability for the 1980-81 academic year. The third letter informed Mr. Osborne that he was not recommended as a faculty member for the upcoming year due to his failure to respond regarding his availability. This court finds that this letter, if not the first two, sufficiently notified plaintiff that he should take action to inform the Law School of his availability.

Plaintiff's only response was his letter of July 30, 1980, to Dean Agnihotri objecting to an interruption of employment and reserving his right to timely accept, reject or seek modification of his

appointment as a faculty member. With the exception of conversations with some Southern Board members in the latter part of 1980, plaintiff took no action on this matter until July, 1981, after completion of the 1980-81 academic year. In July of 1981, Mr. Osborne's attorney wrote Dean Agnihotri regarding the previous academic year, and at that time, gave notice of Mr. Osborne's availability for teaching. In November, 1981, a written request was made to the Board of Supervisors for review of this matter.

This Court finds that plaintiff's claim is barred by laches. For almost a year (July 30, 1980, until July 7, 1981) plaintiff took no action in pursuing his claim against defendants. Furthermore, there is no showing that between November 12, 1981 (letter to Southern University Board of Supervisors) and the filing of this suit in November, 1982, that plaintiff or

his attorney did anything to press this claim. Considering the evidence, this Court finds that plaintiff delayed unreasonably in presenting his claim.

In addition, this Court finds there is substantial prejudice to the public body by this delay. Dean Agnihotri testified that two additional people, former Chief Justice Sanders and Professor Donegan were hired to teach courses that plaintiff would have taught. This Court holds that the orderly fiscal process of the state university would be upset by requiring defendants to pay back salary to plaintiff when the University has already paid others for teaching in his place. Prejudice would exist if duplication of positions and salaries were required.

For the above reasons, the defendants' exception of laches is sustained and suit is dismissed at plaintiff's costs.

Baton Rouge, Louisiana, this 25th day of April, 1983.

s/DANIEL W. LEBLANC
19th JUDICIAL DISTRICT
COURT
DIVISION H

APPENDIX "B"

MILTON OSBORNE, JR. No. CA 84 0517

VERSUS COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

JESSE N. STONE, JR., INDIVIDUALLY, etc., et al.

Before GROVER L. COVINGTON, C.J., and COLE, CARTER, LANIER AND JOHN S. COVINGTON, JJ.

CARTER, Judge.

[Footnotes converted to endnotes]

This is a suit by a tenured university professor for a declaratory judgment defining his employment status, reinstatement to his former position of employment, and to his former position of employment, and all backpay, allowances, benefits and other emoluments of office. Defendants[1] filed an "exception" of laches. After an evidentiary hearing, the trial court rendered judgment sustaining the

exception of laches and dismissed the suit. This devolutive appeal followed.

FACTS

In August of 1971, Milton Osborne, Jr. became employed as a professor of law at Southern University School of Law. He acquired tenure in 1975. Because of an policy of the American Bar Association about faculty members not working full time in the law school, Dean B.K. Agnihotri of the Southern Law School began sending out a letter to all faculty members to ascertain their availability to teach on a full-time basis. After 1975, this letter of availability was customarily sent out ever year to each faculty member.

On May 9, 1980, at a faculty meeting, a letter of availability was given to each faculty member requesting formal notice of availability to teach for the 1980-81

academic year. A reply was requested by May 16, 1980. Mr. Osborne was present at this meeting. When Mr. Osborne failed to timely communicate his intentions, Dean Agnihotri again requested notice of his availability to teach. Mr. Osborne was given until May 23, 1980, to respond, and, if no response was received by that date, it would be assumed that he was not available to teach. No response was received, and, by letter dated July 21, 1980, Dean Agnihotri informed Mr. Osborne that he would not be recommended as a member of the law faculty for the 1980-81 academic year.

By letter dated July 30, 1980, Mr. Osborne answered Dean Agnihotri's letter as follows:

> Receipt of your letter of July 21, 1980 in which you disclosed an expression of intent not to recommend my appointment to the Law School Faculty for the 1980-81 academic year, is hereby acknowledged. Please be advised that I intend and expect that there would be no involuntary interruption of my employment as a tenured faculty member of the Southern University School of Law unless and until there has

just been a finding of just cause after due deliberations and proceedings are had and made definitive.

I shall reserve my right to timely accept, reject or seek modification of my presumptively continuous tenured appointment as a member of the law school faculty only after having has a reasonable opportunity to thoroughly consider the terms and conditions of the appointment for the 1980-81 academic year.

Mr. Osborne was not assigned any classes, and he did not teach or attempt to teach in the 1980-81 academic year. Instead, two individuals were hired to replace Mr. Osborne and to teach his courses. Dean Agnihotri acknowledged that tenured professors are normally on continued appointment, but considered Mr. Osborne's nonavailability for the 1980-81 academic year as a resignation (and not a termination).[2] At that time, Mr. Osborne did not request a hearing on the matter.

When preparing faculty recommendations for the 1981-82 academic year, Dean Agnihotri, by letter dated June 23, 1981, requested advice from Jesse N. Stone, Jr.,

the President of Southern, concerning the status of Mr. Osborne. By letter dated July 7, 1981, Mr. Robert Williams, counsel for Mr. Osborne, advised Dean Agnihotri of his client's availability to teach for the 1981-82 academic year. President Stone responded by letter dated August 3, 1981, informing Mr. Osborne that his abandonment of his job for one full academic year constituted a resignation. By letter dated November 21, 1981, Mr. Williams formally requested the Board of Supervisors of Southern University to review Mr. Osborne's case. On November 12, 1982, Mr. Osborne filed the present suit.

DOCTRINE OF LACHES

Laches is an equity doctrine of the common law that is without statutory (codal) basis in Louisiana. It has been engrafted jurisprudentially into our law to a limited degree. However, that jurisprudence is somewhat confused. State ex rel. Guste v.

Estate of Himbert, 327 So.2d 698 (La.App. 1st Cir.1976), writs denied, 330 So.2d 308, 311 (La.1976). Because laches is an equity doctrine, Louisiana courts can only use it in the absence of express law. La.C.C. art. 21; Terrebonne Parish Police Jury v. Kelly, 428 So.2d 1092 (La.App. 1st Cir.1983). For example, laches is not applicable to bar a suit solely on the basis of the passage of time where the statutory law has established a prescriptive period.[3] Corbello v. Sutton, 446 So.2d 301 (La. 1984); Munson v. Martin, 249 La. 925, 192 So.2d 126 (1966); Succession of Picard, 238 La. 455, 115 So.2d 817 (1959). However, laches can provide a defense when other factors, coupled with the passage of time, are present.

The doctrine of laches has been applied to claims by public employees for reinstatement. In Williams v. Livingston Parish School Board, 191 So. 143, 144-145

(La.App. 1st Cir. 1939), appears the following:

> Sound public policy requires that an employee of a public body who claims to have been illegally discharged should press his claim for reinstatement with diligence and without unnecessary delay. The rule that laches on the part of such public employee will bar his claim for reinstatement is not based on any law of prescription or limitation of actions, but it arises from reasons of public policy. The processes of government must go on and employees and officials must be paid out of public revenue for carrying on the functions of government. Where a discharged employee sits idly by for an unreasonable length of time without pressing his claim for reinstatement, those charged with the duty of securing the necessary working personnel cannot hold up the administrative functions of government awaiting a decision on the part of the discharged employee as to what course he will take. The prevention of duplication of positions and the payment of double salaries requires such discharged employee, not only to press his demands, but also to submit his claim to the courts for adjudication without unnecessary delay.

See also Fields v. Rapides Parish School Board, 231 La. 914, 93 So.2d 214 (1957) and Doyal v. Bossier Parish School Board, 340 So.2d 392 (La.App. 2d Cir.1976). To successfully invoke the doctrine of laches to unprescribed claims by the public

employee, a public entity must prove (1) unreasonable delay by the employee in presenting his claim, and (2) substantial prejudice to or upset of the public's fiscal affairs. Bradford v. City of Shreveport, 305 So.2d 487 (La.1974); Stansbury v. City of Opelousas, 341 So.2d 33 (La.App. 3rd Cir.1976), writ refused, 343 So.2d 197 (La.1977). The application of the doctrine of laches is within the discretion of the trial court, and each case must be decided on its own facts and circumstances. Molero v. Bass, 322 So.2d 452 (La.App. 4th Cir.1975), writ denied, 325 So.2d 609 (La.1976).

Mr. Osborne contends that laches is an affirmative defense which can only be determined after a trial on the merits and that it was error to decide its applicability on the trial of an exception. The appellees contend laches can properly be raised by way of an exception.

LSA-C.C.P. art. 927 provides that the objections which may be raised through the peremptory exception include, but are not limited to the five enumerated objections set forth in that article. The note to art. 927 provides: "The list is illustrative, not restrictive." The function of the peremptory exception is to have the plaintiff's action declared legally nonexistent or barred by law, and hence the exception tends to dismiss or defeat the action. LSA-C.C.P. art. 923.

The jurisprudence has treated the doctrine of laches as both an exception and as an affirmative defense. In Bradford v. City of Shreveport, supra, Munson v. Martin, supra, Labarre v. Rateau, 210 La. 34, 26 So.2d 279 (1946), Stansbury v. City of Opelousas, supra, Doyal v. Bossier Parish School Board, supra, and Kachelmyer v. Ames, 335 So.2d 525 (La.App. 1st Cir.1976), laches was treated as an affirmative defense to be

heard on the merits. In Corbello v. Sutton, supra, Succession of Picard, supra, and Williams v. Livingston Parish School Board, supra, laches was asserted by an exception, but the exception was referred to and decided on the merits. In Molero v. Bass, supra, the court ruled laches could be determined after an evidentiary hearing on an exception pleading laches or on the merits of the case. In Barnett v. Develle, 289 So.2d 129 (La.1974), Miller v. East Ascension Telephone Company, Inc., 331 So.2d 182 (La.App. 1st Cir.1976) and Albritton v. Union Parish School Board, 307 So.2d 676 (La.App. 2nd Cir. 1975), writs denied, 310 So.2d 844 (La.1975), laches claims were heard on exceptions. (In Barnett and Miller, the exceptions were overruled, and, in Albritton, the exception was sustained.)

Whether laches may be raised by objection as a peremptory exception or whether laches constitutes an affirmative

defense on the merits must be determined on a case by case basis.

On May 9, 1980, plaintiff was made aware of the reasonable requirement that he make known his availability to teach for the 1980-1981 academic year. The chronology of events thereafter clearly demonstrated plaintiff's intention to abandon his position, not withstanding his letter of July 30, 1980.

After reviewing the jurisprudence, we believe the views expressed in Barnett v. Develle, supra, Miller v. East Ascension Telephone Company, Inc., supra, and Albritton v. Union Parish School Board, supra are the most persuasive for the case sub judice.

It is apparent from the record that unreasonable delay has occurred in presenting a claim for public employment and substantial prejudice to the public body will result form this delay. Therefore,

plaintiff's claim should be barred by the effect of reason and law. In the case sub judice, laches is an objection properly raised by peremptory exception, and the plaintiff's claim was properly disposed of by that procedural device.[4]

This assignment of error is without merit.

DECREE

For the foregoing reasons, the judgment of the trial court sustaining the exception pleading the objection of laches is affirmed at appellant's costs.

AFFIRMED

COLE, J., dissents for reasons assigned.

LANIER, J., dissents and assigns reasons.

COLE and LANIER, Judges, dissenting.

We do not agree that laches is properly the subject of an exception. The Code of Civil Procedure clearly demonstrates laches is an affirmative defense.

La.C.C.P. art. 921 defines an exception as follows:

> An exception is a means of defense, other than a denial or avoidance of the demand, used by the defendant, whether in the principal or an incidental action, to retard, dismiss, or defeat the demand brought against him. [Emphasis added].

The functions of the three exceptions are described in La.C.C.P. art 923 as follows:

> The function of the declinatory exception is to decline the jurisdiction of the court, while the dilatory exception merely retards the progress of the action, but neither exception tends to defeat the action. The function of the peremptory exception is to have the plaintiff's action declared legally nonexistent, or barred by effect of law, and hence this exception tends to dismiss or defeat the action.

Laches does not "decline the jurisdiction of the court" and does not "retard[s] the progress of the action" and, thus, cannot be an objection under the declinatory and

dilatory exceptions. If laches is the subject of an exception, it must be an objection under the peremptory exception. However, laches, if established, does not declare the plaintiff's action legally nonexistent or barred by effect of law. As correctly observed in the majority opinion, laches is based on an unreasonable delay which causes substantial prejudice and must be decided on the merit facts of each case. Thus, in Kachelmyer v. Ames, 335 So.2d 525, 528 (La.App. 1st Cir.1976), this court observed as follows:

> The doctrine of laches addresses itself exclusively to the evidentiary effects of delay. The doctrine should not be applied until after a hearing on the merits so that the Court may have before it all the evidence which could be produced by the proponents of the claim. Labarre v. Rateau, 210 La. 34, 26 So.2d 279 (1946). Travelers' plea of laches does not provide a basis for dismissing appellant's suit before a trial on the merits.

An affirmative defense raises new matter which, assuming the allegations in petition are true, constitutes a defense to

the action and will defeat the plaintiff's demand on its merits. La.C.C.P. art 1005; Webster v. Rushing, 316 So.2d 111 (La.1975); Modicut v. Bremer, 398 So.2d 570 (La.App. 1st Cir.1980). Article 1005 provides as follows:

> The answer shall set forth affirmatively arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, division, duress, error or mistake, estoppel, extinguishment of the obligation in any manner, failure of consideration, fraud, illegality, injury by fellow servant, transaction or compromise, and any other matter constituting an affirmative defense. If a party has mistakenly designated an incidental demand as an affirmative defense, and if justice so requires, the court, on such terms as it may prescribe, shall treat the pleading as if there had been a proper designation. [Emphasis added]

Official revision comment (e) for Article 1005 provides, in pertinent part, as follows:

> Certain common law concepts enumerated as affirmative defenses in Fed.Rule 8(c), such as accord and satisfaction, laches, license, and waiver, have been recognized and adopted in varying degrees by the jurisprudence of Louisiana. They have not been expressly included in the enumeration

although to the extent that these concepts are recognized in our jurisprudence they are included within the omnibus phrase 'any other matter constituting an affirmative defense.'
[Emphasis added].

Official revision comments (a) and (e) show that Article 1005 is based on Federal Rule 8(c). Federal Rule 8(c) provides as follow:

> AFFIRMATIVE DEFENSES. In pleading to a proceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation. [Emphasis added].

It is well settled in federal jurisprudence that laches is an affirmative defense. Moore v. Tangipahoa Parish School Board, 594 F.2d 489 (5th Cir.1979); United States v.

One (1) 1963, Hatteras Yacht Ann Marie, 584 F.2d 72 (5th Cir. 1978). It is well settled in Louisiana jurisprudence that when a Louisiana procedural rule is based on a federal procedural rule, federal decisions provide guidance and persuasive precedents for interpreting the Louisiana rule. Parish National Bank v. Lane, 397 So.2d 1282 (La.1981); Cf. State v. Bradford, 367 So.2d 745 (La.1978).

Laches is an affirmative defense. New Orleans Firefighters Association Local 632 v. City of New Orleans, 263 La. 649, 269 So.2d 184 (1972). The applicability of laches can only be determined after a trial on the merits when the facts supporting a plaintiff's claim can be compared with the reasons for any delay in asserting the claim and the resulting prejudice, if any, to a defendant. Laches is not properly the subject of an exception and should not have been disposed of by that procedural device.

We respectfully dissent. We are saddened that our brothers in the majority have chosen to sacrifice the clear meaning of our Code of Civil Procedure on the altar of expediency.

ENDNOTES:

[1] Jesse N. Stone, Jr., the President of the Southern University System; B.K. Agnihotri, Dean of the Southern University School of Law; and the Board of Supervisors of Southern University.

[2] See, for example, Kalme v. West Virginia Board or Regents 539 F.2d 1346 (4th Cir. 1976) and Akyeampong v. Coppin State College, 538 F.Supp. 986 (D.Md.1982), aff'd, 725 F.2d 673 (4th Cir. 1983).

[3] Where no definitive period for an appeal is established, the appeal must be taken within a reasonable time. Nelson v.

State Board of Education, 366 So.2d 948 (La.App. 1st Cir.1978), writ denied, 368 So.2d 142 (La.1979).

[4] See Bradford v. City of Shreveport, 305 So.2d 487 (La.1974); Barnett v. Develle, 289 So.2d 129 (La.1974); State ex rel. McMurray v. Orleans Parish School Board, 185 La. 502, 179 So. 834 (1938); State ex rel. Koehl v. Sewerage and Water Board of New Orleans, 179 La. 117, 153 So.533 (1934); Spillman v. City of Baton Rouge, 417 So.2d 1212 (La.App. 1st Cir.1982); Devillier v. City of Opelousas, 247 So.2d 412 (La.App.3rd Cir.1971); and State ex rel. Wiltz v. Sewerage and Water Board of New Orleans, 145 So. 34 (La.App.Orl.Cir.1932). See also Fields v. Rapides Parish School Board, 231

La. 914, 93 So.2d 214 (1957); Williams v. Livingston Parish School Board, 191 So. 143 (La.App. 1st Cir.1939); and Fontenot v. Evangeline Parish School Board, 185 So. 104 (La.App. 1st Cir.1938).

APPENDIX "C"

MILTON OSBORNE, JR. NUMBER 85-C-1531

VERSUS SUPREME COURT OF LOUISIANA

JESSE N. STONE, JR.

INDIVIDUALLY AND/AS PRESIDENT OF THE SOUTHERN UNIVERSITY SYSTEM; B.K. AGNIHOTRI INDIVIDUALLY AND/AS DEAN OF SOUTHERN UNIVERSITY SCHOOL OF LAW; AND THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS

In re: Osborne, Milton, Jr.; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, 472 So.2d 223, First Circuit, Number CA 84 0517; Parish of East Baton Rouge 19th Judicial District Court Div. "H" Number 261, 717.

Granted. the contention of laches may not be raised by exception; assuming without deciding that laches is available in Louisiana, it may be urged only as an affirmative defense. See LSA-C.C.P. art.

1005, Comment (e). The judgments of the trial court and court of Appeal are vacated and the case is remanded for further proceedings according to law.

DIXON, C.J., concurs in the grant and reversal and remand. There is no "laches" in La., C.C. 3457. I would remand to determine whether plaintiff abandoned his position or waived his rights.

CALOGERO, J., would simply grant the writ and bring the case up.

APPENDIX "D"

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| MILTON OSBORNE, JR. | NUMBER 261,717 |
| VERSUS | 19TH JUDICIAL DISTRICT COURT |
| JESSIE N. STONE, JR., INDIVIDUALLY AND AS PRESIDENT OF THIS SOUTHERN UNIVERSITY SYSTEM, ET AL. | PARISH OF EAST BATON ROUGE<br>STATE OF LOUISIANA |

WRITTEN REASONS FOR JUDGMENT

This matter comes before the Court on plaintiff's Petition for Declaratory Judgment and Other Relief. For reasons presented herein, plaintiff's petition for declaratory judgment is granted and plaintiff is hereby declared a tenured teacher at Southern University School of Law. However, plaintiff's petition for other relief, in the form of back wages for the school years 1980 through present, is hereby denied.

This Court finds that plaintiff did not resign from his tenured position at Southern

University School of Law since plaintiff's letter dated July 30, 1980, although prolix, is interpreted by this Court as stating a demand for a formal tenure hearing if the plaintiff's employment were not to be continued. "Please be advised that I intend and expect that there would be no involuntary interruption of my employment as a tenured faculty member of the Southern University School of Law unless and until there has just been a finding of just cause after due deliberations and proceeding are had and made definitive." Plaintiff's July 30, 1980, letter addressed to Dean B.K. Agnihotri. This Court believes that the plaintiff was entitled to a tenure hearing prior to termination and that once the plaintiff made his request for such a hearing, it was incumbent upon Southern University officials to grant and hold such a hearing prior to plaintiff's termination.

In this case, Southern University officials did nothing further until suit was filed and the matter became the subject of litigation. Thus, it is this Court's judgment that plaintiff remains a tenured professor at Southern University School of Law since his right to a tenure hearing has never been granted to him by the University, and therefore, he has not been legally terminated.

However, plaintiff's demand for salary during the period 1980 to present for which period the plaintiff was not teaching law at Southern University School of Law is rejected by this Court for the following reasons. The plaintiff never presented himself to any of the University officials, and more particularly, to Dean Agnihotri of the Law School, as being ready, willing be able to perform his teaching duties during this period. Also, the plaintiff, even in his only response to the several letters of

Dean Agnihotri, did not indicate that he was ready, willing and able, or that he had any desire to teach during the 1980-81 school year, but only that plaintiff considered himself a tenured professor until given a tenure hearing. The fact that the plaintiff is in this Court's opinion still a tenured professor at the Southern University School of Law does not necessarily justify the conclusion that he is entitled to be paid for the semesters that he did not teach. Plaintiff can not permit the University to hire substitute teachers, i.e., former Chief Justice Sanders and Professor Donegan, to teach courses that plaintiff should have taught and expect to be paid himself for not teaching these courses. This would result in a substantial prejudice to the public body and would preclude an orderly fiscal process by the University.

It is true that during July of 1981 plaintiff's attorney sought to obtain a

teaching schedule for the plaintiff, but by this time the University took the justifiable position that the plaintiff had abandoned his teaching duties by his failure to respond to the several requests of Dean Agnihotri and the University. Obviously, due to poor communications and an apparent lack of interest on the part of the plaintiff, the entire matter had deteriorated to the point where neither plaintiff nor defendant could have a meeting of the minds relative to plaintiff's status. It would certainly be unjust enrichment for plaintiff to receive his regular salary for the period 1980 to present when plaintiff did not teach during that period, when the University was forced to retain two additional teachers to teach plaintiff's courses and when the plaintiff did not diligently press any claim for most of this period.

For these reasons, judgment is rendered in favor of the plaintiff declaring plaintiff to be a tenured teacher at Southern University School of Law. The remainder of plaintiff's demands are hereby dismissed with prejudice. Judgment will be signed accordingly. Court costs are to be borne equally by the parties.

Baton Rouge, Louisiana, this 23rd day of December, 1986.

s/JOSEPH KEOGH

JUDGE, 19TH JUDICIAL DISTRICT COURT

19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

MILTON OSBORNE, JR.

VERSUS NO.: 261,717

JESSE N. STONE, JR., INDIVIDUALLY AND AS PRESIDENT OF THE SOUTHERN UNIVERSITY SYSTEM; B.K. AGNIHOTRI, INDIVIDUALLY AND AS DEAN OF SOUTHERN UNIVERSITY SCHOOL OF LAW; AND THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS

WRITTEN REASONS FOR AMENDED JUDGMENT

This matter come before the Court on Plaintiff's Motion for New Trial which was

granted. No new evidence was adduced and argument heard at hearings set by this Court on April 10, 1987 and June 5, 1987, and the matter was submitted based upon the entire record and the argument of counsel.

In this Court's "Written Reasons for Judgment" of December 23, 1986, it was determined that Plaintiff, Milton Osborne, Jr., was a tenured faculty member at Southern University. In his Motion for New Trial and argument before the Court, Plaintiff seeks compensation for the years that he was not allowed to teach along with certain rights in the Teacher's Retirement System of Louisiana.

The testimony is uncontradicted that had Milton Osborne been not deprived of his position at Southern University, he would have earned the following sums:

1980-81 - $35,000
1981-82 - $36,000
1982-83 - $36,500
1983-84 - $37,000
1984-85 - $37,500
1985-86 - $38,000
1986-87 - $38,500

As such, Plaintiff is claiming a total of $258,500 in back wages, plus future wages for $39,000 for the academic year 1987-88, $39,500 for the academic year 1988-89, and, similarly, wages for each additional year until he is reinstated.

A careful review of the evidence in this proceeding has clearly convinced this Court that no purpose would be served and, indeed, justice would be further delayed if this matter were to go through the appellate process and, if the original judgment were affirmed, then Southern University was to convince a faculty committee to review the alleged acts or omissions of Milton Osborne, Jr. It is this Court's opinion that Milton Osborne is a tenured professor and he has to do nothing more than resume his teaching

position at Southern University at a salary for the 1988-89 academic year of $39,000. The Defendants are prohibited from making any additional imposition or requirement for Plaintiff to resume his position as a tenured faculty member of the Southern University School of Law.

This Court further finds that the delay in this case going through the judicial process, which now has been some seven (7) years, is not entirely attributable to Plaintiff. It is this Court's opinion that it would be unjust enrichment for Plaintiff to be granted compensation for the entire seven (7) year period in the amount of $258,000 (the amount of salary lost by Plaintiff from 1980 to 1987), but it would also be inappropriate to deny Plaintiff compensation for that entire period of time. As such, it is this Court's opinion that Plaintiff should be awarded his salary for the last three (3) of the seven (7) years,

namely, the academic year 1984-85 for the sum of $37,500, his salary for the academic year 1985-86 for the sum of $38,000, and his salary for the academic year 1986-87 in the sum of $38,500, plus his future salaries for future academic years. Additionally, inasmuch as Plaintiff was a tenured professor during that entire sever (7) year period of time, he should not be deprived of his rights in and to the Teacher's Retirement System of the State of Louisiana. Counsel for Plaintiff has submitted that prior to December 31, 1985, Plaintiff would have had the right of purchasing requirement credit for time spend in the military service had he been teaching at Southern University School of Law and not deprived of his employment. However, it is possible now for Plaintiff to purchase his retirement credit for time spent in the military service inasmuch as those provisions of law expired December 31, 1985. However, it

seems appropriate that Plaintiff be granted the right to purchase, at Plaintiff's expense, retirement credit for time he spent in the military service. This right shall exist for a one (1) year period of time from the date this judgement becomes final. This is only fair inasmuch as had Plaintiff not been deprived of his employment, he would have had that right while at Southern University. This Court, in ordering the Teacher's Retirement System of Louisiana to allow Milton Osborne to purchase retirement credit, considers it as an economical move for the taxpayers of the State of Louisiana inasmuch as it removes from this Court's consideration any damages that Plaintiff may have suffered by being deprived of this right. Secondly, Plaintiff is granted the right, again at his sole cost and expense, of gaining credit for the seven (7) years (1980-1987) in the Teacher's Retirement System of the State of Louisiana based upon

the above mentioned salaries. Normally, the Defendants would be required to pay the employer's contribution which the Court understands to be over $31,896, and the Plaintiff required to pay his portion which would be approximately $23,254. However, the Court, in giving Plaintiff the right to purchase this retirement credit, requires Plaintiff to purchase it as Plaintiff's sole expense, if he so elects, credit for those seven (7) years, and this has been taken into consideration by the Court in the award of salary for the three (3) year period of time above mentioned.

This Court hopes that these Written Reasons and the Judgment which will be signed by this Court will give the proper incentive to the parties to put this lengthy litigation to an end. It appears to the Court that it would certainly be in the best interest of the Plaintiff and the State of Louisiana to do so as soon as possible.

Judgment will be signed accordingly.

Baton Rouge, Louisiana, this 5th day of June, 1987.

s/JOSEPH KEOGH
JUDGE, 19TH JUDICIAL
DISTRICT COURT

APPENDIX "E"

MILTON OSBORNE, JR. No. 87 CA 1158

VERSUS COURT OF APPEAL
OF LOUISIANA,
JESSE N. STONE, ET AL. FIRST CIRCUIT

Filed: November 22, 1988.

Before EDWARDS, SHORTESS and SAVOIE, JJ.

SHORTESS, Judge.

Milton Osborne, Jr. (plaintiff), was hired as a law professor at Southern University School of Law in 1971. He acquired tenure in 1975. Since 1975, Southern has experienced accreditation difficulties with the American Bar Association (ABA). One problem area specified by the ABA was the practice of law by Southern's full-time faculty members during the academic year, in prohibition of Rule 402(B) of the ABA Standards For Approval of Law Schools. In 1975, Southern began sending letters routinely to its law professors asking that they "communicate

their availability" to teach full-time in the upcoming academic year. Plaintiff had received such letters in the past and responded. On May 9, 1989, he received a letter from Bishma K. Agnihotri, dean of the Southern University School of Law, at a faculty meeting.

When plaintiff did not respond to the May 9, 1980, letter, Agnihotri sent a letter to him by certified mail, return receipt requested,[1] stating that if no response was received by May 23, 1980, it would be assumed plaintiff was not available. After receiving no response from plaintiff, Agnihotri sent plaintiff a letter which stated, in part, "please be informed that your name is not being recommended as a member of the law faculty for the year 1980-81."

On July 30, 1980, plaintiff wrote Agnihotri, in part:

> [p]lease be advised that I intend and expect that there would be no

> involuntary interruption of my employment as a tenured faculty member of the Southern University School of law unless and until there has just been a finding of just cause after due deliberations and proceeding (sic) are had and made definitive.
>
> I shall reserve my right to timely accept, reject or seek modification of my resumtively (sic) continuous (sic) tenured appointment as a member of the law school faculty only after having had a reasonable opportunity to throughly (sic) consider the terms and conditions of the appointment for the 1980-81 academic year.

On May 9, 1980, plaintiff and Janice G. Clark entered into a written partnership agreement to practice law in Baton Rouge.

On August 25, Southern notified plaintiff that his office had been assigned to another law professor. Plaintiff never showed up to teach classes. He testified that he called a few people at the school to talk about the situation but never called Agnihotri. He vaguely recalled going out to Southern to check and see whether he had gotten any assignments. Southern hired two professors for the 1980-81 academic year to

teach plaintiff's classes, at a total cost of $71,000.00. During that period, plaintiff considered himself on unpaid sabbatical leave. He testified he believed the situation would be handled this way after talking to Lionel Johnson of the Southern University Board of Supervisors, but he never applied for sabbatical leave.

Plaintiff hired a lawyer, Robert C. Williams, in August or September, and they both testified that throughout the next year they engaged in informal attempts to resolve the situation by talking with various members of the Southern University Board of Supervisors. After a July 6, 1981, meeting with Jesse N. Stone, Southern's president, and a follow-up letter by Williams to Agnihotri intended to serve as notice that plaintiff was now available to teach, Stone wrote Williams on August 3, 1981. This letter stated in part: "As indicated to you in our conversation, the Dean is of the

opinion that Mr. Osborne's abandonment of his job for a period of one full academic year under the circumstances here present is inexcusable and amounts to a resignation." On November 12, 1981, Williams made formal demand on Lionel Johnson, chairman of the Southern University Board of Supervisors, for a hearing. No hearing was ever held. On November 12, 1981, plaintiff filed suit for "Declaratory Judgment and Other Relief" against Jesse N. Stone, Jr., individually and as president of the Southern University System; B.K. Agnihotri, individually and as dean of the Southern University School of Law; and the Southern University Board of Supervisors.

Defendants filed an exception of laches and lack of diligence which the trial court sustained, and it dismissed plaintiff's suit. Plaintiff took a devolutive appeal to this court which, in a 3-2 decision, affirmed the trial court, 472 So.2d 223.

The Supreme Court then granted a writ, holding:

> Granted. The contention of laches may not be raised by exception; assuming without deciding that laches is available in Louisiana, it may be urged only as an affirmative defense. See LSA-C.C.P. art. 1005, Comment (e). The judgments of the trial court and Court of Appeal are vacated and the case is remanded for further proceedings according to law.
>
> 476 So.2d 809.

After remand, defendants amended their answer to affirmatively plead the doctrine of equitable estoppel, or laches. After trial, the court granted the declaratory judgment and found that plaintiff did not resign from his tenured position at Southern. In its original reasons for judgment it denied, however, plaintiff's demand for salary. Later, the trial court amended its original reasons and granted plaintiff his salary for the academic years beginning with 1984-1985. Defendants have suspensively appealed.

Initially we note that neither the trial court's original reasons nor its amended reasons for judgment addressed defendants' affirmative defense. We also find it unnecessary to treat defendant's affirmative defense in our review because the record convinces us that plaintiff voluntarily abandoned his job. Even though plaintiff, a tenured law professor, possessed a property interest in his position which requires due process protection under both the state and federal Constitutions, we find that he abandoned his position, which action divested him of any protected property rights. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Bell v. Dept. of Health and Human Resources, 483 So.2d 945 (La.1986), reh'g denied, cert. denied, 479 U.S. 827, 107 S.Ct. 105, 93 L.Ed.2d 55; Kalme v. West Virginia Board of Regents, 539 F.2d 1346 (4th Cir.1976).

We do not agree with the trial court's finding in its original reasons for judgment that plaintiff did not abandon his job because the July 30, 1980, letter was a request for a hearing if his employment was not to be continued. This letter arrived some ten weeks after Agnihotri had first requested plaintiff to notify the school of his availability. In the interim, plaintiff testified, he was too busy grading papers to respond to Agnihotri; he testified he responded as he eventually did because he wanted to see what he was going to get "and sort of deal before I tell you, you know." Contracts were made yearly at Southern. The letter does express the hope that there would be no "involuntary" termination of employment "before a finding of just cause after due deliberations . . . are had," but goes on to say that the writer reserved his rights to make up his mind after he had a chance to think over the terms of the

appointment. It reads more like a first step in negotiating a contract than a demand for a hearing after termination. In any event, Agnihotri's letters before July 30 cannot be construed as notice of "involuntary" termination of plaintiff.

In Kalme, a tenured professor brought suit alleging he was denied his job without due process. Kalme had accepted another job while simultaneously signing a contract with West Virginia State College. He failed to show up at the beginning of the fall term to teach. Kalme was informed by the president of the college that he abandoned his job. The court held that Kalme's voluntary breach of contract led to abandonment of his property rights under the contract because any property right was dependent upon the contractual relationship. See also Akyeampong v. Coppin State College, 538 F.Supp. 986 (D.Maryland 1982).

Plaintiff, like Kalme, voluntarily breached his contract with Southern when he refused to respond to Southern's reasonable request as to his availability. Plaintiff argues that he was a tenured faculty member and nothing in the contractual relationship required him to respond to Agnihotri's inquiries. We believe Southern was entitled to make such inquiries, since it would lose accreditation if its faculty practiced law in violation of Rule 402(B) of the ABA Standards For Approval of Law Schools.

Because the abandonment was voluntary on plaintiff's part, his July 30 letter which speaks of an "involuntary" termination of his contract cannot be considered a request for a hearing. Plaintiff was never terminated by Southern, and Southern believed that he had abandoned his job. he never asked for sabbatical leave; he simply never returned. Defendants' answer in this proceeding alleged that plaintiff

voluntarily abandoned any rights he had to contest his resignation, not his termination. See Jones v. Orleans Parish School Board, 679 F.2d 32, 37, n. 6 (5th Cir.) (opinion withdrawn in part in Jones v. Orleans Parish School Board, 688 F.2d 342 (5th Cir.1982)).

It was plaintiff's voluntary refusal to respond to Southern's reasonable request for advice as to his full-time availability for teaching the fall 1981 semester which created the loss of his job. Plaintiff's failure to respond to Agnihotri's letters did not result in his termination. Plaintiff was terminated only after he voluntarily abandoned his job. He relinquished his property rights, and defendants owed him no hearing because there were no rights left to protect. Plaintiff's suit is dismissed at his costs.

APPENDIX "F"

MILTON OSBORNE, JR. NO. 88-C-3117

VERSUS SUPREME COURT
OF LOUISIANA

JESSE N. STONE, et. al.

Filed: February 17, 1989.

In re Osborne, Milton Jr.; - Plaintiff(s); applying for writ of certiorari and/or review; to the Court of Appeal, First Circuit, No. CA87 1158; Parish of East Baton Rouge, 19th Judicial District Court, Div. "M", No. 261717.

Prior report: La.App., 536 So.2d 473.

Denied.

APPENDIX "G"

| | |
|---|---|
| MILTON OSBORNE, JR. | SUIT NO. 261,717<br>DIV. "H" |
| VERSUS | 19TH JUDICIAL<br>DISTRICT COURT |
| JESSIE N. STONE, JR.,<br>INDIVIDUALLY, ETC.,<br>et al | PARISH OF EAST<br>BATON ROUGE<br><br>STATE OF LOUISIANA |

MOTION FOR LEAVE TO FILE AMENDED PETITION

Milton Osborne, Jr., Petitioner in the above captioned matter, moves for leave to amend his original Petition in the following manner:

1.

Petitioner wish to amend Paragraph 1 of his original Petition so that said Paragraph shall now read as follows:

"1.

The following parties made defendants herein:

(A) Jesse N. Stone, Jr., a person of the full age and a resident of East Baton

Rouge Parish, Louisiana. He is being sued both individually and in his capacity as President of the Southern University System;

(B) B. K. Agnihotri, a resident of East Baton Rouge Parish, Louisiana. He is being sued individually and as Dean of the Southern University School of Law;

(C) The present Members of the Southern University Board of Supervisors and all persons who may serve as a Member of the Southern University Board of Supervisors during the pendency of this action. The present and future members of the Southern University Board of Supervisors are being sued individually and in their official capacity."

2.

Petitioner wish to amend Paragraph IX of his original Petition so that said Paragraph shall now read as follows:

"IX.

Defendants have denied Petitioner his rights under the following: The applicable Tenure Laws and other regulations of Southern University; the Constitution and Laws of the States of America particularly Petitioner's right of substantive and procedural due process under the Fourteenth Amendment to the U.S. Constitution, Petitioner's right of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. 1981 et seq (particularly 42 U.S.C. 1983) and the First Amendment to the U.S. Constitution."

3.

Petitioner wish to amend Paragraph XIV of his original Petition so that said Paragraph shall now read as follows:

"XIV..

After trial of this matter Petitioner is entitled to reinstatement to his position of employment, for all back pay, allowances and other emoluments of his position,

together with legal interest on all sums owed from due date until paid. Further, Petitioner desires and is entitled to receive from Defendants, in solido, the sum of FIVE MILLION AND 00/100 ($5,000,000.00) DOLLARS as punitive damages together with legal interest thereon from date of judicial demand until paid and for reasonable attorney's fees."

4.

Petitioner wish to amend the Prayer of his original Petition so that said Prayer shall now read as follows:

"WHEREFORE, PETITIONER PRAYS FOR:

I. Service be had and citation issued as required by law;

II. For judgment declaring and defining his employment status consistent with Defendants' policies and procedures as promulgated pursuant to applicable State and Federal law;

III. All general and equitable relief.

BY ATTORNEY

s/ MILTON OSBORNE, JR., ESQ
CRAWFORD BUILDING-
SUITE 320
440 NORTH FOSTER DRIVE
BATON ROUGE, LOUISIANA 70806
TELEPHONE: (504) 926-4904

ORDER

IT IS ORDERED that the above and foregoing Amended Petition be filed as prayed for and according to law.

Baton Rouge, Louisiana, this 8th day of November, 1985.

s/LEBLANC
JUDGE, NINETEENTH JUDICIAL DISTRICT COURT

APPENDIX "H"

SUPREME COURT OF LOUISIANA

NO. _____

* * * * * * * * * * * * * * * * * * * * * *

MILTON OSBORNE, JR.
VERSUS

JESSE N. STONE, JR., INDIVIDUALLY AND AS PRESIDENT OF THE SOUTHERN UNIVERSITY SYSTEM; B.K. AGHIHOTRI, INDIVIDUALLY AND AS DEAN OF THE SOUTHERN UNIVERSITY SCHOOL OF LAW; AND THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS

* * * * * * * * * * * * * * * * * * * * * *

MILTON OSBORNE, JR., APPLYING FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT FROM THE FIRST CIRCUIT COURT OF APPEAL STATE OF LOUISIANA

The application of Milton Osborne, Jr., respectfully represents that he is the Plaintiff in the cause entitled "Milton Osborne, Jr. v. Jesse N. Stone, Jr., Individually and as President of the Southern University System; B.K. Agnihotri, Individually and as Dean of Southern University School of Law; and the Southern University Board of Supervisors," No.

261,717 on the docket of the 19th Judicial District Court for the Parish of East Baton Rouge, and submits his application for a Writ of Certiorari and for Supervisory and/or Remedial Writs as follows:

I.

BASIS FOR SUPERVISORY JURISDICTION

Petitioner seeks to invoke the supervisory jurisdiction of this Honorable Court, pursuant to Article V, Section 10 of the Louisiana Constitution of 1974. This writ is applied for in accordance with the procedural requirements of Article 2201 of the Louisiana Code of Civil Procedure and Rule 10, § 4 of the Louisiana Supreme Court Rules.

Supervisory jurisdiction of this Court is sought on the grounds that the First Circuit Court of Appeal erred and abused its discretion in reversing the Trial Court's decision and denying Plaintiff the protection of his property rights in

accordance with the due process clauses of the Louisiana and United States Constitution by not affording Plaintiff any hearing whatsoever prior to his dismissal as a tenured professor, violating the Louisiana Teacher's Tenure Act by not affording Plaintiff any hearing whatsoever prior to his dismissal, and violating the terms and requirements of the "Faculty Handbook" of Southern University which also specifically require a public hearing prior to a tenured faculty member being deprived of his employment.

II.

STATEMENT OF THE CASE

The facts of this case are not in dispute. Milton Osborne, Jr. was hired as a law professor at Southern University School of Law in 1971 and acquired tenure in 1975. The "Faculty Handbook" (Plaintiff's Exhibit 1, p. 325) in effect at the time of Professor Osborne's hiring, acquiring

tenure, and ultimate dismissal from the University in 1979 grants a teacher the right to a public hearing before dismissal or discontinuance. Specifically, the "Faculty Handbook" of June, 1979, provides in part (p. 334-A):

> "In case of a recommendation by the President of an institution to dismiss or discontinue the employment of a tenured teacher, that teacher shall have the right of a public hearing before the board of supervisors or a committee authorized by the Board of Supervisors to act for it in receiving evidence." (Emphasis added.)

Additionally, the same Faculty Handbook contains distinct rules and regulations for "Termination of Employment" on Pages 79 through 87. In part, these rules require that written notice of the termination of a tenured faculty member shall be at least twelve (12) months before the expiration of an appointment (P-1, p. 333), and further require that notice be given and a hearing held. A tenured faculty member may be also

dismissed for cause, but only after notice is given and a hearing held.

The same Faculty Handbook required the administration of the Law School to begin negotiations for appointments for the following fall as early as possible stating:

> "Negotiations for appointments for the following Fall should be begun and completed as early as possible in the academic year." (P-1, p. 334.)

The Faculty Handbook additionally required that the offer of reappointment made prior to May 1st for the following fall, stating specifically:

> "To permit a faculty member to give due consideration and timely notice to the institution and the circumstances outlined in paragraph 3, an offer of appointment for the following Fall at another institution should not be made after May 1. The offer should be a 'firm' one, not subject to contingencies." (P-1, p. 334.)

The Faculty Handbook specifically states that a faculty member should not resign to seek other employment later than May 15th or thirty (30) days after receiving the notification of his terms of continued

employment, whichever date is later (P-1, p. 334).

Finally, the Louisiana Teacher's Tenure Law (La. R.S. 17:411, et seq., made applicable to college teachers by La. R.S. 17:3501) additionally requires both notice and a hearing before a tenured teacher's employment is discontinued.

The testimony of all of the witnesses is undisputed that Milton Osborne, was not only tenured, but his employment was presumed to have been continuing and he had to do nothing other than accept or reject the "firm" offer of re-employment.

On May 9, 1980, a week and a half past the deadline imposed by the Faculty Handbook for tendering a contract for the next academic year, Dean Agnihotri of the Southern University Law School sent a letter to faculty members asking that they "communicate their availability" to teach full-time in the upcoming academic year.

There are no provisions whatsoever in any faculty handbook authorizing or requiring a "letter of availability." Plaintiff did not respond to the May 9, 1980, letter and Dean Agnihotri sent a letter by certified mail on May 19, 1980, stating that if there was no response within four (4) days by May 23, 1980, that, "we shall assume that you are not available." During this time frame and thereafter, Plaintiff was giving his final examinations at the school, grading papers, and engaging in a host of other activities at school (p. 244, p. 247). During this same time frame, Dean Agnihotri wrote a letter to Professor Osborne relative to an honor code violation by some students and requested that the Honors Committee take the necessary action (Plaintiff's Exhibit P-1b, p. 314). On June 12th, Associate Dean Harris wrote Professor Osborne requesting that he administer an additional final examination to a student who had missed the

earlier examination (Plaintiff's Exhibit P-1c, p. 316).

Professor Osborne did not respond within the four (4) day period of time required in the May 19, 1980, letter and continued with his activities at the University as above mentioned. On July 21, 1980, Dean Agnihotri sent a letter to Professor Osborne at his post office box in Plaquemine, Louisiana, stating that Professor Osborne had not responded to the letters of May 9th or May 19th, and provided in conclusion:

> "Please be informed that your name is not being recommended as a member of the Law Faculty for the year 1980-81." (Defendants' Exhibit D-3.)

Upon receipt of this letter, Professor Osborne immediately wrote Dean Agnihotri on July 30, 1980, which provided as follows:

> "Receipt of your letter of July 21, 1980, in which you disclosed an expression of intent not to recommend my appointment to the Law School Faculty for the 1980-81 academic year, is hereby acknowledged. Please be advised that I intend and expect that

there would be no involuntary interruption of employment as a tenured faculty member of the Southern University School of Law unless and until there has just been a finding of just cause after due deliberations and proceeding are had and made definitive.

I shall reserve my right to timely accept, reject or seek modification of my presumptively continuous tenured appointment as a member of the law school faculty only after having had a reasonable opportunity to throughly consider the terms and conditions of the appointment for the 1980-81 academic year." (Defendants' Exhibit D-4.)

Neither Dean Agnihotri nor any member of the administration responded to Professor Osborne's letter of July 30th. There was no hearing held despite Professor Osborne's request for "due deliberations and proceeding" contained in his letter of July 30, 1980, and as specifically required by the "Faculty Handbook" for 1979 which was in effect at that point in time. On August 25th, Professor Osborne was notified to turn in his keys and was not assigned any classes to teach for the 1980-81 semester.

The testimony is undisputed that after writing the July 30, 1980, letter, Professor Osborne contacted numerous individuals on the Southern University Board of Supervisors attempting to be assigned classes for the Fall of 1980 (p. 233-234). The testimony is further undisputed that after talking to the Chairman of the Board of Supervisors, Lionel Johnson, Professor Osborne was under the good faith belief that he was on sabbatical leave without pay for that year and that he would be reassigned classes in the fall for the 1981-1982 academic year (p. 248).

Thereafter, during the 1980-81 academic year at which time Plaintiff believed himself to be on unpaid sabbatical leave, he continued to serve as the representative of Southern University on the Board of Governors at the Louisiana Bar Association, the Bar Admissions Committee, and the Louisiana Law Institute (p. 99). During this period of time, repeated meetings were

held by Plaintiff and his attorney with members of the Southern Board of Supervisors to insure that Professor Osborne would be reappointed for the 1981-82 academic year. Specifically, Professor Osborne met several times with Board Member, Walter Dumas, George Winfield, head of the Faculty Union, and the Reverend Lionel Johnson, Chairman of the Board of Supervisors (p. 134). Also his attorney at the time, Robert Williams, talked several times to Board Members Dumas and Horatio Thompson and also President Stone (p. 267).

The remainder of the course of events is accurately summarized by the First Circuit Court of Appeal in the opinion complained of herein as follows:

"Plaintiff hired a lawyer, Robert C. Williams, in August or September, and they both testified that throughout the next year they engaged in informal attempts to resolve the situation by talking with various members of the Southern University Board of Supervisors. After a July 6, 1981, meeting with Jesse N. Stone, Southern's president, and a follow-up letter by Williams to Agnihotri intended to serve as notice that

plaintiff was now available to teach, Stone wrote Williams on August 3, 1981. This letter stated in part: 'As indicated to you in our conversation, the Dean is of the opinion that Mr. Osborne's abandonment of his job for a period of one full academic year under the circumstances here present is inexcusable and amounts to a resignation.' On November 12, 1981, Williams made formal demand on Lionel Johnson, Chairman of the Southern University Board of Supervisors, for a hearing. No hearing was ever held. On November 12, 1981, plaintiff filed suit for 'Declaratory Judgment and Other Relief' against Jesse N. Stone, Jr., individually and as president of the Southern University System; B.K. Agnihotri, individually and as Dean of Southern University School of Law; and the Southern University Board of Supervisors.

Defendants filed an exception of laches and lack of diligence which the trial court sustained, and it dismissed plaintiff's suit. Plaintiff took a devolutive appeal to this court which, in a 3 - 2 decision, affirmed the trial court. The Supreme Court then granted a writ, holding:

> Granted. The contention of laches may not be raised by exception; assuming without deciding that laches is available in Louisiana, it may be urged only as art. 1005, Comment (e). the judgments of the trial court and Court of Appeal are vacated and the case remanded for further proceedings according to law.

After remand, defendants amended their answer to affirmatively plead the doctrine of equitable estoppel or laches. After trial, the court granted

> the declaratory judgment and found that plaintiff did not resign from his tenured position at Southern. In its original reasons for judgment it denied, however, plaintiff's demand for salary. Later, the trial court amended its original reasons and granted plaintiff his salary for the academic years beginning with 1984-85. Defendants have suspensively appealed."

The First Circuit Court of Appeal continued to hold that "plaintiff voluntarily abandoned his job" stating that:

> "It was plaintiff's voluntary refusal to respond to Southern's reasonable request for advice as to his full-time availability for teaching the fall 1981 semester which created the loss of his job."

As such, the Appellate Court has held that despite the violations of the Southern University administration of not tendering a contract to Professor Osborne before May 1, 1980, as required by the Faculty Handbook, and despite the fact that Professor Osborne was prohibited by the same Faculty Handbook from resigning after May 15, 1980, Plaintiff abandoned his job by not responding to the

letters of May 9th and May 19th (granting until May 23rd to advise of his availability), although the testimony is uncontradicted that Plaintiff was tenured and his employment was presumed to be continuing. Additionally, the First Circuit held that inasmuch as Professor Osborne "abandoned" his position, this divested him of any protective property rights and, as such, he was not entitled to the due process protection required by both the State and Federal Constitutions. The Appellate Court also held that because of this "abandonment," Plaintiff was not entitled to any hearing as required by the Faculty Handbook and as requested in Plaintiff's letter of July 30, 1980, and is required by the Louisiana Teachers' Tenure Law. The Trial Judge, after hearing the witnesses, concluded that the July 30, 1980, letter was a request for a hearing, but the First Circuit held that it was not an express

request for a hearing, but "reads more like a first step in negotiating a contract than a demand for a hearing after termination."

The record is likewise not in dispute that Professor Osborne's contract was for only nine (9) months out of the year, he was only paid nine (9) months out of the year and that he was unemployed each summer (p. 256). Professor Osborne and other faculty members were not eligible for unemployment compensation and were free during the summer months to pursue any employment they desired. Professor Osborne had made a habit of engaging in the practice of law every summer since 1970 (p. 255). The sole purpose of his law practice was to take care of the summer months in which he had no compensation and was not under contract to Southern University School of Law (p. 256). The law practice of Professor Osborne fully complied with the standards of the American Bar Association rules (p. 256). Professor

Osborne entered into a law partnership on May 9, 1980, but this in no way violated the rules of the American Bar Association, nor was he charged with any such violation. Southern University School of Law was aware of the part-time law practice of Mr. Osborne and he had even appeared as co-counsel with Assistant Dean Harris on a number of occasions (p. 258).

III.

ASSIGNMENT OF ERROR

A. The First Circuit Court of Appeal erred and abused its discretion in reversing the decision of the Trial Court and specifically by failing to grant Plaintiff a public hearing in accordance with the due process clause of the Louisiana and United States Constitution prior to depriving him of his employment as a tenured faculty member of the faculty of the Southern University School of Law.

B. The First Circuit Court of Appeal erred and abused its discretion in reversing the decision of the Trial Court and specifically by failing to enforce the provisions of the Southern University Faculty Handbook requiring a hearing prior to termination for a tenured faculty member and also in violating the provisions of the Louisiana Teacher's Tenure Act.

C. The First Circuit Court of Appeal erred and abused its discretion by ignoring the evidence obtained in the record and substituting its interpretation for that of the Trial Judge.

## IV.

## ARGUMENT

A. It is respectfully submitted that the opinion of the First Circuit Court of Appeal is clearly erroneous and contrary to the previously established State and Federal jurisprudence requiring compliance with the due process provisions of the State and

Federal Constitution prior to divesting a tenured faculty member of his employment. Also, it is respectfully submitted that the First Circuit Court of Appeal failed to enforce the provisions of the Southern University Faculty Handbook requiring a hearing prior to termination and the provisions of the Louisiana Teacher's Tenure Act. Additionally, the opinion of the First Circuit Court of Appeal is fraught with factual errors and completely ignores the uncontradicted testimony of the witnesses and the evidence of record, and completely ignores the opinion of the Trial Judge who had the opportunity to observe the demeanor of the witnesses and their credibility.

Specifically, the Court of Appeal holds that Professor Osborne "abandoned" his position because he did not respond to two (2) written communications from the Dean, albeit Professor Osborne was at work at the law school giving examinations, grading

examinations, and attending to other duties during that time. The Appellate Court states that "Plaintiff never showed up to teach classes for the fall of 1980." This statement by the Appellate Court completely ignores the fact that Professor Osborne was wrongfully deprived of his employment for the fall of 1980 and was assigned no classes to teach, had no classroom to teach in and no students to teach.

The Appellate Court likewise stated that the Trial Court did not address the Defendants' defenses of laches and equitable estoppel and did not consider that an issue because of Plaintiff's voluntary abandonment of his job. This statement is incorrect as the Trial Judge did consider that issue in determining that Plaintiff did not abandon his job or engage in the conduct that forms a prerequisite for the applicability of the doctrine of laches or equitable estoppel, if

such a doctrine exists under the law of the State of Louisiana.

The Appellate Court held that the abandonment occurred simply because Plaintiff refused to respond to the Dean's written request of availability, albeit there was absolutely no requirement of such in the Faculty Handbook or Professor's Osborne's contract of employment. This "theory of abandonment" adopted by the First Circuit Court of Appeal is entirely different from that promulgated by Southern University the year after Professor Osborne attempted to return to class after believing that he had been on unpaid sabbatical leave. At that point in time, in August of 1981, President Stone wrote Professor Osborne's attorney a letter that stated in part:

> "As indicated to you in our conversation, the Dean is of the opinion that Mr. Osborne's abandonment of his job for a period of one full academic year under the circumstances here present is inexcusable and amounts to a resignation." (Plaintiff's Exhibit P-1g).

As such, the University's position was previously that Professor Osborne resigned and/or abandoned his job for not teaching the 1980-81 academic year (during which time he was assigned no classes, no students, no classroom and had no contract, all as a result of the the wrongful conduct of the administration of Southern University), but the Appellate Court now holds that the actual abandonment occurred due to Professor Osborne not responding to the Dean's letters of May 9, 1980, and May 19, 1980, the last of which gave only four (4) days in which to respond. Of course, Professor Osborne did respond once he found that his contract was not being renewed as was called for by the Faculty Handbook and the Tenure Laws of the State of Louisiana, and he demanded a hearing for which there was no response. Indeed, even after attempts to work the matter out voluntarily with the administration and the Board of Supervisors

of Southern University, Plaintiff's attorney by letter of November 12, 1981, made formal demand for a hearing, but no hearing was ever heid.

The opinion of the First Circuit Court of Appeal cites only five (5) cases in support of its position that Professor Osborne is not entitled to the due process protection of the State and Federal Constitution. None of these cases remotely support the position taken in the Appellate Court's opinion that a tenured professor can be deprived of his employment without fulfilling the due process requirements of the State and Federal Constitution.

Specifically, in Board of Regents v. Roth, 92 S.Ct. 2701 (1972), the Supreme Court held that an untenured faculty member, whose contract had been normally renewed before, had an expectancy of employment and that this was a property right protected by the due process clause of the Federal

Constitution and he was entitled to a hearing prior to termination or non-renewal.

In Bell v. Department of Health and Human Resources, 483 So.2d 945 (1986), cert denied, 107 S.Ct. 105, the Louisiana Supreme Court held that an employee (not a teacher) who had been reallocated to another position was not entitled to a pre-allocation notice or a hearing where there was no allegation of any act of discrimination and the employee was not deprived of his employment.

In Kalme v. West Virginia Board of Regents, 539 F.2d 1346 (4th Cir. 1976), the tenured faculty member was reappointed and assigned classes to teach. He failed to appear for class and intentionally and flagrantly breached his contract. Nevertheless, he was still granted a hearing in accordance with the rules of the university and the due process requirements of that State's Constitution and the Federal

Constitution prior to the tenured employee's termination. In Akyeampong v. Coppin State College, 539 F.Supp. 986 (D. Maryland 1982), the university did reappoint the tenured faculty member to his position for that academic year and assigned him classes. The faculty member did not show up for class after being assigned classes and, instead, he attended another university as a student that year without any authority from the college that was employing him. He had been specifically denied sabbatical leave. Indeed, after Plaintiff did not show up for classes, the university wrote plaintiff informing him that his absence was not approved, that he was in violation of his employment contract, and that the college considered his employment as an instructor at an end. In the instant case, Professor Osborne was never reappointed, given a contract, assigned classes, and despite his

request, was not given a hearing at any time.

The case of Jones v. Orleans Parish School Board, 679 F.2d (5th Cir. 1982), cited by the Appellate Court actually is directly on point but supports Plaintiff's position that he was wrongfully deprived of his employment. Jones brought action against the School Board alleging violations of Title VII, 42 U.S.C. § 200 et seq., 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. 1985. The District Court, accepting the magistrate recommendations, held that the Section 1981 and Section 1983 claims were prescribed, and that with respect to the Title VII claim, that Jones had abandoned his teaching position. The Appellate Court in commenting upon the "abandonment" theory stated as follows:

> "The Board's first defense to the due process claim is that Jones 'abandoned' his position by failing to comply with the reinstatement requirements and that therefore he was not entitled to notice or a hearing. In support of this

contention the Board cites a Louisiana Supreme Court decision which held that the failure of a tenured teacher to return a signed contract by a specified date constituted a voluntary termination of employment and waiver of the teacher's right to notice and a hearing under Louisiana's Teacher Tenure Law. State ex rel. Cody v. Caldwell Parish School Board, 215 La. 645, 41 So.2d 461 (1949).

[10] Obviously a state has the right to provide for the termination of teachers and other public employees who abandon their positions. But in the case of tenured employees, the process of discharging employees for 'abandonment' must comport with due process requirements. For example, the state may not by simply labeling some action or lack of action 'abandonment' create a right to discharge a public employee as a subterfuge to defeat tenure requirements. Whether Louisiana can by law require automatic discharge of a tenured teacher who after adequate notice admittedly fails to return a signed contract by a specified date we need not here decide. But if there is any factual issue about whether the teacher did fail to meet the requirements, the teacher is entitled to notice and hearing with respect to such issue. If there is an issue as to the facts and their application to the statute, the automatic waiver of notice and hearing provided in the Louisiana Teacher Tenure Law could not be applied without running afoul of Fourteenth Amendment due process requirements. The question before us is whether the constitutional rights of Jones under the due process clause of the

> Fourteenth Amendment were respected by the School Board in its actions which led to his discharge for 'abandoning' his teaching position. The Board cannot under the contested facts of this case rely upon an automatic right to discharge without any obligations on the Board to take actions by way of communication with Jones and giving him the opportunity to be heard on disputed issues."

As such, the Appellate Court remanded the case to the District Court to consider the evidence to determine whether or not his right to due process was violated. Of course, in the instant case, the Trial Court did determine that Professor Osborne had not abandoned his position and, therefore, his rights to due process were violated and ordered reinstatement. The Appellate Court's reference to Note 6 in the Jones opinion, supra, is again supportive of Professor Osborne's position in the instant case. Note 6 in the Jones opinion simply provided that the Board could not argue in that case that the alleged abandonment was the equivalent of a voluntary resignation

since the Board never actually terminated him. Strangely, this is exactly what is argued in the instant case pertaining to Professor Osborne in direct violation of the rule enunciated in this footnote. The rehearing of Jones v. Orleans Parish School Board, 688 F.2d 342, simply is not applicable and did nothing to change any of the rules enunciated in the first opinion. The Court simply held that while a three year Louisiana prescriptive period might apply to a tenured teacher who sued for violation of his contractual rights, a Title VII claim of racial discrimination is barred by the passage of a one (1) year limitation. Of course, in the instant case, Professor Osborne is not basing his denial of due process on racial discrimination, but contractual violations and being denied the due process of law required under the State and Federal Constitutions.

As noted above, the law cited by the First Circuit Court of Appeal in no way whatsoever supports their opinion. Additionally, the Appellate Court completely ignored the record of this proceeding and the findings of the Trial Judge who observed the witnesses and questioned Professor Osborne at length. The Appellate Court ignored its standard of review applicable in reviewing the decisions of the trier of fact. It has been well established in Louisiana jurisprudence. In the recent case of Wilkinson v. Sweeney, 532 So.2d 243 (La. App. 3rd Cir. 1988), at Page 245, the rule was stated:

> "[1] In this appeal we were asked to review both factual and legal issues. The standard in Louisiana for reviewing factual issues determined by a trial court is set forth in Arceneaux v. Domingue, 365 So.2d 1330 (La. 1979) and Canter v. Koehring Company, 283 So.2d 716 (La. 1973). Both cases illustrate the accepted standard that an appellate court should give great weight to the factual conclusions of the trier of fact and should not disturb those findings absent manifest error."

Also, in Suire v. Suire, 523 So.2d 201 (La. App. 3d Cir. 1988), the Court stated at Page 202:

> "[1] A reviewing court must give great weight to the factual conclusions of the trier of fact, and reasonable credibility evaluations and inferences of fact should not be disturbed, where there is a conflicting testimony. Till v. Delta School of Commerce, 487 So.2d 180 (La. App. 3d Cr. 1986)."

In the instant case, the Appellate Court completely substituted its factual conclusions, evaluations, and inferences for those of the Trial Judge simply because they disagree. Simply disagreement does not equal manifest error.

## CONCLUSION

Plaintiff urges this Honorable Court to issue a writ of certiorari reversing the First Circuit Court of Appeal's decision reversing the judgment of the District Court holding Plaintiff to be a tenured faculty member and further holding that Plaintiff did not abandon his position. The Trial Court's decision was proper under the evidence of record and mandated by the facts

of this particular case. The rights of Plaintiff have not been protected in the instant case and he has not been afforded the due process required by the State and Federal Constitution, much less the Faculty Handbook and the Teacher's Tenure Law of the State of Louisiana.

Applicant prays that this Court issue a writ of certiorari to the opinion of the First Circuit Court of Appeal of the State of Louisiana reversing or annulling their decision which reversed the judgment of the Honorable Judge Keogh.

RESPECTFULLY SUBMITTED:

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ENDNOTES:

[1] A copy of the return receipt shows the signature of Milton Osborne, Jr., and is dated May 21, 1980.

## CERTIFICATE OF SERVICE

I certify that three (3) copies of the above and foregoing corrected Petition for Certiorari and accompanying Appendix have been mailed to William J. Guste, Jr., Attorney General, c/o David G. Sanders, Assistant Attorney General, Department of Justice, State of Louisiana, P. O. Box 94005, Baton Rouge, Louisiana 70804, with first class postage prepaid, by depositing same with the United States Post Office this 24th day of May, 1989. Three copies of the original Petition were mailed to counsel of record on April 25, 1989.

RICHARD J. DODSON